No. 10251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIF JEFFCOTT, his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

APPELLANTS' REPLY BRIEF.

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We desire to comment upon only a few of the additional facts included in appellee's statement of the case.

Once again on pages 2 and 3 of appellee's brief, he dwells upon the fact that Mr. Jeffcott, according to Dr. Thompson's testimony, stated that "money was no object". Throughout the trial of this case in the lower court, and throughout appellee's brief, he adopts the attitude that this should settle the matter and Dr. Donovan be permitted to charge any amount that he himself considered reasonable. Repeatedly during the trial this thought was urged and throughout this brief it is again urged. Fortunately, however, the appellants and the appellee have presented their respective cases to a court of law. It is a situation where services were performed upon an implied contract and the award for those services

is not to be determined by any state of mind held by one or both of the contracting parties. It is purely on the basis of *quantum meruit* and a consideration of every fact and circumstance is to be given in determining what constitutes reasonable compensation to be paid by the appellants and to be received by the appellee. Any preconceived notions that either may have had must be weighed in the balances and moderated to fit the circumstances of the parties to the action. In the final analysis, the court makes the contract which the parties should have made before the services were performed.

On page 3 appellee states that no consideration should be given to the development, existence and condition of ventral hernia in the Jeffcott infant. Mrs. Jeffcott was permitted to testify, without objection [Tr. pp. 462-463], that the condition of ventral hernia was first noticed four or five weeks after the child was brought home from the hospital. That it was thereafter diagnosed by Dr. Carrell when the baby was four and one-half or five months old. She had previously stated that the hernia would have to be operated and that it continued draining for between eight months and a year after the operation. Dr. Thompson [Tr. p. 538] testified that on or about the 1st of October, 1939, there was a tiny spot in the wound from which he was told there occurred perhaps a fourth of a teaspoon of drainage during certain twenty-four hour periods. Whether or not it be considered as a fecal fistula, an incisional hernia, a ventral hernia, or a hole in the child's stomach through which a liquid substance drained and the intestines protruded, which hole was in the wound left by the operation, seems to us to be of relatively the same weight. In any event, the child has

a condition which, according to Dr. Carrell, will have to be operated and corrected.

Once again, however, we do not wish to place too much stress upon this isolated fact and state that it is simply to be considered along with everything else in the case. We do not even wish to be charged with saying that this condition was due to neglect on the part of Dr. Donovan. It is simply a condition which will necessitate the expenditure of additional money and should be considered in determining what reasonable compensation should be paid to Dr. Donovan.

Appellee, in the last paragraph on page 4, again stresses Mr. Jeffcott's failure to discuss the fee with Dr. Donovan prior to his departure. His explanation [Tr. p. 93] was that he intended to discuss the matter Monday afternoon prior to Dr. Donovan's departure. Dr. Donovan [Tr. p. 222] stated that he did not feel it his place to approach Mr. Jeffcott. Here again let us say that whoever was at fault, or most at fault, and irrespective of who might have had the greatest obligation, these facts must merge into the complete picture and be considered only as elements going into a determination of what is a reasonable fee. It would appear that had the parties discussed the matter while Dr. Donovan was in Tucson that their ideas were so far apart that no agreement would have been reached. Mr. Jeffcott's idea of perhaps a thousand dollars was only $11,500 short of what Dr. Donovan thought, unless Dr. Donovan's ideas came into existence after being told while in Tucson by Dr. Carrell [Tr. p. 478] that Mr. David C. Jeffcott was a man of very moderate means, but that his father did have considerable money. We rather imagine this was the case.

Appellee's comments on pages 5 and 6 of his brief as to the obligation of appellee to make out a *prima facie* case are somewhat puzzling. This is not an argument for a directed verdict at the close of appellee's case, but a discussion on appeal of the entire case which covers the evidence of both appellee and appellant. Evidence of the ability of the patient to pay was introduced and whether or not it was an obligation of appellee to prove this, it is evidence which materially affects the amount of his recovery.

Reply to Argument of Appellee.

I.

Appellee contends that appellants' defense involved only the following propositions (Appellee's Brief p. 7): (1) that their ability to pay should be measured only in terms of annual income; (2) that Dr. Donovan was obligated to determine his fee on the basis of taking a percentage of their net annual income; and (3) that, since they had no net annual income at the time the operation was performed, appellee had no right to any fee beyond the sum which was paid him in order to "free our consciences".

If this be true, why did appellants introduce evidence showing the development of the ranch from 1937 to 1939, which was the date of the operation, and continue thereafter, over appellee's objection, to show the increased earnings from the venture and their hope that by 1942 a net profit of between $5,000 and $8,000 per year might be realized. Appellants considered that their net income was only one of a number of facts entering into a determination of their financial ability, which in turn con-

stitutes one element or fact going into a determination of what was reasonable compensation for Dr. Donovan. At no time during the trial was it ever suggested, and at no time in this brief will it be suggested, that Dr. Donovan was entitled to no compensation because the ranch was being operated at a loss at the date of the operation. Such fact should, however, be considered.

It is true that Drs. Gore, Holbrook and Carrell all testified that it is a nationally recognized practice, as a general rule, for surgeons to charge one-tenth or one-twelfth of a person's annual income for a major surgical operation. These doctors admitted that where Dr. Donovan was required to fly from New York to Tucson and return, being away from his office for approximately sixty hours, that additional compensation should be awarded. In their expression of opinion as to what a reasonable fee would amount to, they made allowance for these additional elements. In the hypothetical questions propounded to them there was incorporated the fact that no net profit would be shown for 1939 but that in later years it was hoped that a net profit would be earned. Notwithstanding this fact, they testified that Dr. Donovan should receive from $1500 to $2000, plus expenses, for his services. How then can counsel say that it is, or has ever been, our position that net income is the sole criterion of ability to pay? We simply attempted to show the complete picture and the fact that the fee charged amounted to approximately two years' net income, if and when their peak earnings would be reached. It amounted to approximately fifteen per cent of their entire wealth. It amounted to one-third of Dr. Donovan's gross earnings for that year. The fee awarded

by the lower court amounted to one-fourth of his net income for that year and one year's net earnings for the appellants when their peak earnings might be reached. We cannot believe, thus this appeal, that such an award constitutes reasonable compensation, but we do not say that he should be confined only to a percentage of net income.

Appellee's comments upon appellants' objections to Finding XXVIII are not substantiated in that appellants' offered amendment [Tr. p. 40] did not contain any summary of receipts and expenditures without explanation for a period of five years. Again and again appellee repeats that the court found that the appellants expended over $40,000 for "personal expenditures" during this four-year period. No reference is made to the fact that over $6,000 of this amount was incurred on behalf of Baby Jeffcott, over $5,000 for income taxes incurred in a liquidation of securities, and a large portion of the $15,000 for 1938 was in reality capital investments in the ranch. Appellee would like for this court, as well as the trial court, to consider that appellants spent money lavishly for personal comforts.

Appellee also criticizes our objections to the inclusion of the court in its Finding of Fact that David C. Jeffcott received a gift from his father, that he borrowed money from his father and executed a mortgage in favor of his father, and subsequently his mother. These facts of course were true, but we see no reason why the court should have emphasized this relationship unless the court was influenced by the fact that the money was borrowed from his father, and as appellee states later on in his brief, "the ultimate necessity of paying off the lien might

be obviated by inheritance from the parents". (Appellee's Brief p. 27.) What place does such a comment have in this brief and what place did such an implication have in the court's finding or in the court's attitude during the trial of this cause? Can the trial court be permitted to speculate as to whether or not David C. Jeffcott will ever inherit any money from his father? It may be said that such is the usual case, but we do not believe that courts of law in this country have gone so socialistic as to base a judgment against an individual upon future possibilities of inheritance. With the modern trend of estate taxes, the Federal Government might take over this mortgage to insure payment of estate taxes. Appellee also states that the fact that Mr. Jeffcott was able to borrow this money "tends strongly to indicate ability to pay". (Appellee's Brief p. 12.) This is another example of the attitude of appellee during the trial of the case to label this as a "source of income". Is the court to presume that inasmuch as Mr. Jeffcott has been able to borrow this money to develop the ranch, that he will be able to go further and borrow an additional $5,000 to pay this judgment? If such be the case, the decision is not based upon the financial condition of Mr. Jeffcott, but upon the possibility that he may be able to borrow additional money. There is no evidence of such fact.

II.

We, of course, do not expect that the charges made by Dr. Donovan for other operations in New York would limit him to even the highest charge that he had made for the operation performed in Tucson. He would certainly be entitled to more compensation. However, the amount of these operations performed by an outstanding

surgeon with a Park Avenue address in New York, throw considerable light upon his regular schedule of charges. The court prevented us from inquiring into the ability to pay of these other patients. It is likely, however, that a man of his eminence, with a select class of patients, would have charged around his top price on these operations. He even testified himself that had this operation been performed in New York that he would have charged between $3,500 and $5,000. He did not elaborate upon why an operation performed for Mr. Jeffcott would be in excess of the highest charge that he had ever previously made. At any rate, these other charges are simply additional facts to be considered, no one of which is to be conclusive.

Dr. Donovan's testimony shows that he is a busy man and great demands are made upon him for his services. The amount of his charges and his gross annual income both throw some light upon his customary charges, which in turn shows an important, but not a conclusive element in the fixing of his charge. Appellee states (p. 18): "The fact stands out that the reasonableness of Dr. Donovan's fee and his annual income for 1939 are and must remain two wholly unrelated matters." We do not believe this court will completely divorce the two.

Appellee's response to our charge that the court was influenced by evidence relating to the wealth of Mr. Jeffcott's father impresses us as being lame. He grabs a time worn appellate court stamp and slaps it on the record and says: "It must be presumed that the court was not influenced by this evidence and that it was disregarded." We fully appreciate the numerous rubber stamps that were available to appellate courts before this appeal was

initiated. Ordinarily every presumption and intendment is resolved in favor of the trial court's decision. This court is at perfect liberty to adopt any one of those stamps and dispose of this case. We have sufficient confidence, however, in the integrity of our United States Appellate Courts so that we know that the court will read the entire transcript of testimony, consider counsels' briefs, and then determine whether or not the lower court considered all of the evidence, all of the elements going into a determination of the fee, and then determine whether or not the lower court apparently was influenced by incompetent evidence in making its decree. This falls clearly within the general rule stated in 26 *R. C. L.* p. 1085.

In that regard, however, we wish to point out to the court the fact that the trial court overruled our objection to evidence of the wealth of appellant David C. Jeffcott's father on several occasions. [Tr. pp. 102, 106, 107.] The court finally stated [Tr. p. 107]: "Let the question be answered and the court will reserve the ruling. *If this seems to the court remote and should not be considered, the court will disregard it altogether.* The question may be answered with the understanding that the ruling is reserved." We do not believe that appellants' counsel had an obligation to renew these objections and request a specific ruling at the close of the case. The mention in Finding No. XXVIII of appellant's parents indicates that the court did not ignore this evidence.

The law upon this point is simply that when a case is tried to the court without a jury, and there is submitted evidence, some of which is competent and some incompetent, and there is sufficient of the former kind to sus-

tain the judgment, it will be assumed on review that the court disregarded the incompetent evidence in arriving at a conclusion and that its admission was harmless.

Cooper v. Francis, 285 Pac. 271 at 273.

The effect of this rule is that it makes no difference as to whether the court sustained the objection, overruled the objection, or simply did not rule upon it. If he improperly admits the evidence, the appellate court may say that he disregarded it; if he rejects it, it may be proper; if he does not rule, the court will say that it was disregarded unless it appears from the record that he was influenced by it. Our position is that the amount of this award indicates that the court was influenced by it and that this state of mind was evidenced by its unconscious acceptance of Finding No. XXVIII. Additional evidence of this fact is contained in the court's statement [Tr. p. 450]:

> "The Court: The relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, *is due for advances on the mortgage,* is the relationship of father and son, isn't that all?" (Italics are those of the briefer.)

Why was there any discussion of the relationship between the father and son? Had it been asserted that this mortgage had not been executed in good faith? At no place in the proceedings had this been done. The court went ahead, [Tr. p. 450], to state:

> "The Court: I do not see the necessity of going into the ramifications. The implication is apparent

> as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right."

The court at this point fell as a victim to the snare intended. That was the implication that since the mortgage lien on appellants' property was in favor of his parents, the ultimate necessity of paying off the lien might be obviated by inheritance from the parents. Appellee's counsel states this as being the meaning of the phrase used by the court: "The implication is apparent."

Once again, may we question the right of the court to consider such a remote possibility and use it as one of the elements to be considered by the court in fixing the contractual rights as between appellants and appellee and basing an award thereon. We feel that appellee in his brief has admitted that it is apparent that the court was influenced by this evidence. It is for this court to decide whether or not "any bell had been rung". (Appellee's Brief p. 28.)

III.

We will not spend much time in rearguing the admissibility of the opinions of Drs. Downs, Burdick and Beekman and refer to our opening brief on this matter. An additional statement of our position, however, is contained in *Citron v. Fields,* 85 Pac. (2d) 534, at 538, Note 6, where we find the following language:

> "All of the elements that go into fixing the reasonable value of services must be considered by an expert in expressing an opinion relative to the reasonable value of the professional services performed. . . ."

We think this to be a fair modern statement of the rule that where a hypothetical question is propounded which calls for an answer upon the ultimate fact to be found by the court, that such question must contain all elements that the court must consider in determining that ultimate fact. It is conceded that the ability of the patient to pay is one of such elements. The hypothetical question propounded contained no facts proving, or tending to prove, such financial condition. Appellee attempts to beg the question by saying that the hypothetical question contained the statement that "money was no object". We do not believe that this bare statement satisfies the rule. If a man with an income of $1200 a year, and gross worth of $5,000, would make such a statement, would the court hold that the opinion of three New York doctors, speaking in the abstract, would conclusively establish what fee was reasonable? Here again we state that even if that statement was made by Mr. Jeffcott, that it furnishes no criterion or conclusive yardstick as to the amount of compensation Dr. Donovan might be entitled to receive, and did not furnish circumstance or evidence of financial ability sufficient to satisfy the requirement of the rule in the hypothetical questions propounded to these experts. Perhaps, as Dr. Burdick stated [Tr. p. 377], that anybody with an income of $5,000 a year did not have any right to expect a fellow to fly down from New York to operate on their baby. However, if such a request is made, and an intermediary, such as Dr. Thompson (who subsequently found himself in an embarrassing position) calls such a doctor and the doctor, without securing any additional information, consents to fly down, his right to compensation must then be determined by the usual rules and evidence.

IV.

We are much impressed by appellee's efforts to explain away (Appellee's Brief pp. 36, 37, 38) the manner in which the evidence of the grandparents' wealth was introduced, which was on the theory that it added to the responsibility of Dr. Donovan in performing the operation, and then to state in this brief that even although consciousness of such responsibility did not exist at the time of the operation, that it was subsequently brought to his attention. Had counsel been equally frank in the trial of the case, we feel sure that the trial court would never have permitted the evidence to be admitted upon a reserved ruling. The only place that it could have occupied any relevant position would have been on the theory that the grandparents were responsible for the payment of Dr. Donovan's fee. Counsel states that if a doctor has performed an operation upon an infant under circumstances that would lead him to the assumption that the family position was ordinary, that thereafter if it came to his attention that such infant was in fact heir apparent to the throne of England, that he would not be entitled to fix a higher fee on account of the tremendous enhancement in his responsibility. We do not believe the analogy is applicable because in that case the Bank of England and the Throne of England would be responsible for the payment of the fee.

We emphatically state that this evidence was introduced upon a representation to the court which was later disproved by appellee's own testimony and which was certainly known at the time when such representation was made.

V.

Appellee dwells considerably upon the importance to be attributed to the testimony of the three New York doctors who testified for Dr. Donovan. (Appellee's Brief, p. 43.) He also comments upon the fact (p. 41) that three physicians of Tucson, Arizona, one of them practicing no surgery whatever, believed that from $1500 to $2000 constituted a reasonable fee for the services of Dr. Donovan. We think that the case cited by appellee, *Coca-Cola Co. v. Moore,* 256 Fed. 640, explains why appellants had no New York doctors testify for them. On page 643 of this decision, the court states:

> "We do not understand that the decision in Ward v. Kohn was intended to limit testimony to lawyers of the particular city in which the services were rendered. There would be distinct objections to such a rule. When plaintiffs are eminent members of the bar, their brethren of the same bar are reluctant to give evidence against them in a suit for their compensation. *Esprit du corps* is a factor in such cases which courts cannot disregard. In the medical profession it is considered unprofessional for one doctor to testify against another in civil litigation."

This decision comments upon the fact that knowledge of the usual compensation for such services can only be learned from those who live in the centers where such litigation is most frequent. We would like to point out the fact that Drs. Carrell, Gore and Holbrook, practicing in Tucson, a recognized health resort, stated that they were familiar with fees charged by eminent physicians and surgeons coming to Tucson from distant places to perform medical and surgical services. New York City has no patent rights upon operations for intestinal obstruc-

tions. Moreover, such operations are not in a class by themselves, but are simply operations requiring a high degree of skill, such as any number of other delicate operations. Brain surgery, heart surgery, operations upon the eye, internal operations, and others too numerous to mention, require specialized skillful attention. We feel that the Tucson doctors were equally competent to express an opinion upon the value of these services, although we recognize the fact that certain professional men from eastern centers do not admit the existence of others skilled in their particular profession outside of their own metropolitan areas.

In closing, we wish to state simply to the court our belief that a fair consideration of the entire testimony and of *all* of the elements that enter into a determination of a reasonable fee will lead the court to the conclusion that a substantial reduction should be ordered in the award of the lower court.

Respectfully submitted,

DARNELL & ROBERTSON,

Attorneys for Appellants